STATE OF ALASKA

IBLA 83-141 Decided January 31, 1984

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving for interim conveyance to Dineega Corporation certain lands without reservation of site easements along the Yukon River. F-14925-A and F-14925-B.

Set aside and remanded.

1. Alaska Native Claims Settlement Act: Appeals: Standing -- Alaska Native Claims Settlement Act: Easements: Decision to Reserve

   The State of Alaska has standing to challenge the failure of the Bureau of Land Management to reserve site easements along a navigable river by virtue of the property interest it holds in the submerged lands of the river and its allegations that site easements are necessary for a reasonable pattern of public travel and access to public lands along the river.

2. Administrative Procedure: Burden of Proof -- Alaska Native Claims Settlement Act: Appeals: Generally -- Rules of Practice: Appeals: Burden of Proof

   When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. Where BLM finds that site easements are not necessary to accommodate existing patterns of travel and an appealing party fails to show otherwise, the BLM decision will ordinarily be affirmed. Where BLM's decision rests on an assumption which is not supported by facts of record, it must be set aside for the record to be supplemented.

APPEARANCES: M. Francis Neville, Assistant Attorney General, for State of Alaska; William B. Schendel, Esq., Fairbanks, Alaska, for Dineega Corporation; James Q. Mery, Esq., Fairbanks, Alaska, for Doyon Corporation; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On September 30, 1982, the Alaska State Office, Bureau of Land Management (BLM), approved for conveyance to Dineega Corporation the surface estate of various lands in the vicinity of Ruby, Alaska, under the provisions of section 12 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611 (1976). 1/

The lands approved for conveyance encompass approximately 28.5 miles of the Yukon River with the village of Ruby lying at about the midpoint. As the Yukon River is a navigable major waterway, the conveyance excludes submerged lands below the ordinary high water mark, which belong to the State of Alaska. 2/ BLM's decision did not reserve any public easements along the Yukon River because BLM had determined that municipal reserves in Ruby, public lands adjacent to the conveyance area and naturally occurring sandbars in the river provided sufficient stopping points to facilitate a reasonable pattern of travel (BLM Answer dated June 30, 1983, at 2).

On November 1, 1982, the State of Alaska appealed the BLM conveyance decision because it failed to reserve certain public easements. On January 17, 1983, the parties reported to this Board that negotiation had rendered two of the issues on appeal moot and that the sole remaining issue was whether BLM failed to reserve an adequate number of site easements along the Yukon River. The Board issued an order segregating secs. 28, 29, T. 8 S., R. 16 E., and sec. 12, T. 8 S., R. 17 E., Kateel River meridian, from the remainder of the lands approved for conveyance. These lands are the only lands subject to this appeal. See Board Order dated January 20, 1983.

Doyon Corporation, 3/ joined by Dineega Corporation, has moved to dismiss the appeal urging that the State does not have standing to appeal because it does not have the requisite "property interest in land affected by the decision." See 43 CFR 4.410(b). They urge that the State is pursuing this appeal in some undefined representative capacity for recreationists who float the Yukon River. They point out that Departmental decisions have held that members of the public at large in general and recreationists in particular do not fulfill the regulatory standing requirements by making claims of recreational use. See Kodiak Aleutian Chapter, Alaska Conservation Society, 2 ANCAB 363 (1978); Appeal of Sam McDowell, 2 ANCAB 350 (1978). Furthermore,

1/ Dineega Corporation is the Native village corporation organized for the village of Ruby. It filed selection applications F-14925-A and F-14925-B on Aug. 30, 1974, and Dec. 3, 1974. In the same decision BLM rejected various State selection applications, F-23220, F-23221, F-79830, F-79832, and F-79836, to the extent that they conflicted with the lands approved for conveyance to Dineega Corporation.

2/ See Memorandum dated Sept. 8, 1982, entitled Final Easements for Dineega Corporation (village of Ruby). Under 43 U.S.C. § 1311 (1976), title to and ownership of the lands beneath navigable waters and the natural resources within such lands and waters are vested in the State. This statutory provision was made applicable to the State of Alaska by section 6(m) of the Alaska Statehood Act, reprinted at 48 U.S.C. Chapter 2 (1976).

3/ Doyon Corporation is the Native regional corporation to which the subsurface estate of the lands at issue will be conveyed.

they argue that the decision styled Ervin K. Terry, 7 ANCAB 63 (1982), supports the principle that the State representing the public has no standing to pursue claims for a group or individual who does not have the requisite standing. They conclude by noting that the State had already had several opportunities to participate in the easement designation process, that the standing requirement was intended to promote speedy conveyancing, and the State should not be granted another opportunity to participate. 4/

The State of Alaska responds that its appeal was not brought on behalf of recreationists and that it does have the requisite standing by virtue of its property interest in the submerged lands and navigable waters of the Yukon River. The State urges that previous easement cases have held that an appellant has standing if he has a property interest which is within or adjacent to the lands to be conveyed and he alleges that an easement determination will affect his ability and that of the public to gain access to publicly owned lands. See Patrick J. Bliss, 6 ANCAB 181, 88 I.D. 1039 (1981). Joseph C. Manga, 5 ANCAB 224, 88 I.D. 460 (1981). The State contends that by classifying the Yukon River as a "major waterway," BLM has acknowledged that the river receives significant use for access to publicly owned lands. 5/ The State asserts that it has a property interest within and adjacent to the lands to be conveyed and that BLM's easement determination will affect the ability of the public to gain access to and use the major waterway and other publicly owned lands because BLM has failed to provide for a reasonable pattern of travel as required by 43 CFR 2650.4-7(b)(3). The State adds that its submerged lands are even more directly affected because BLM determined that they would provide an adequate and reasonable alternative to the reservation of periodic site easements along the river.

[1] Section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976), directs the Secretary of the Interior to reserve public easements across selected lands

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4/ On the other hand, Doyon notes that it would not challenge the State's standing if the harm alleged involved some broad injury to the State and its citizenry at large. Doyon explains:

"[I]f the State were appealing a denial of public access to navigable public waters beneath which lie submerged lands owned by the State, standing would clearly exist * * *. The 'property interest' of the State (the submerged lands) would be 'affected' by a decision which denied access to its citizens. The State would be properly seeking redress on behalf of all of its citizens, in its parens patriae capacity, to a property interest which had been harmed. But in the instant appeal the harm alleged involves little more than possible inconvenience to a few nonmotorized river travelers. As such, the State has not asserted a broad-based injury to the general public but instead has articulated the narrow interests of a small group and should be found not to have standing to pursue this appeal."

5/ 43 CFR 2650.0-5(o) defines "major waterway" as:

"[A]ny river, stream, or lake which has significant use in its liquid state by watercraft for access to publicly owned lands or between communities. Significant use means more than casual, sporadic or incidental use by watercraft, including floatplanes, but does not include use of the waterbody in its frozen state by snowmobiles, dogsleds or skiplanes. Designation of a river or stream as a major waterway may be limited to a specific segment of the particular waterbody."

and at periodic points along the courses of major waterways that are reasonably necessary to guarantee international treaty obligations and a full right of public use and access for recreation, hunting, transportation, utilities, docks, and other public uses. Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (1977).

In the Manga and Bliss cases referred to by the State, the Alaska Native Claims Appeal Board found that a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as an affected property interest so long as he or she asserts a public use of the desired easement. In Henry W. Waterfield, 77 IBLA 270 (1983), this Board recently held that a private individual who asserts a property interest in public lands (mining claims) and who perceives that his interest will be adversely affected, has standing to appeal a decision by BLM not to reserve a public easement in a conveyance to a Native Corporation. Similarly, we agree with the State of Alaska that its property interest in the submerged lands and navigable waters of the Yukon River are sufficiently affected by BLM's conveyance decision to afford standing to the State in its own right and as an embodiment of the public. The State alleges that its property interest is affected by BLM's decision because the easements are necessary to a reasonable pattern of public travel and access along the river, a major waterway, and because BLM has designated the State's submerged lands as reasonable alternative stopping points. With the qualification that access does not have to be totally denied for the State's interest to be affected by the BLM decision, we find that this is exactly the situation postulated by Doyon Corporation in which it would agree that the State has standing. See note 4, supra. The State is not required to prove that the effect alleged exists to have standing as that goes to the merits of the case.

As noted, BLM has concluded that no site easements along the Yukon River within the conveyance area are needed because there are reasonable alternative stopping points which provide for a reasonable pattern of travel along the river. The alternative stopping points are the municipal reserves of Ruby, public land adjacent to the conveyance area, and naturally occurring sandbars.

In its statement of reasons, the State notes that BLM's decision not to designate site easements was not based upon a conclusion that river travelers would have no need to stop within the conveyance area and argues that there is no rational basis for the determination that the identified alternatives are reasonable.

The State first points out that the only publicly owned land within the conveyance area are a few lots within Ruby designated as municipal reserves on the townsite survey plat and contends that BLM assumed, without establishing, that these reserves are available for the kinds of uses that site easements provide for, i.e., docking, loading and unloading, and temporary camping. The State argues that the language of 43 CFR 2650.4-7(b)(3) calling for "a reasonable effort * * * to locate parking, camping, beaching, or aircraft landing sites on publicly owned lands" requires more than an assumption based on the existence of publicly owned lands. The State contends that BLM made no effort to locate sites on the reserves for the specified uses, that BLM did not contact the city to find out what uses are currently being made of the reserves, that BLM did not attempt to coordinate its decision with the

Ruby land-use plans, and that there is no documentation in the easement file to show that comments were solicited from Ruby officials. The State argues further that BLM's assumption that the publicly owned lands will necessarily be managed for the benefit of the traveling public is unjustified because the reserves are small lots surrounded by private land, the local Government will be most responsive to local concerns, rather than those of Yukon River travelers, and the local citizenry will not need public travel facilities for the simple reason that they live there. Finally, the State argues that the reasonable effort required by the regulation, requires BLM to obtain some commitment from the city of Ruby.

The State also challenges BLM's decision that sandbars and islands will afford travelers stopping places. It points out that to the extent that such sandbars and islands are above the mean high water line, they are included in the Dineega Corporation conveyance and thus cannot be used by the public absent a site easement, and to the extent that such places are below the mean high water line, at least some of the time, they will be submerged land which by its nature is wholly unsuitable for the public facilities that site easements are intended to provide. The State argues that the very fact that Congress provided for the reservation of periodic site easements along major waterways indicates that Congress did not view the State's submerged lands as adequate to meet the needs of the public. The State notes that in Alaska Public Easement Defense Fund v. Andrus, supra at 677, the court stated that the "purpose of easements along waterways is to provide a place for docks, campsites, and such facilities to serve those who are properly using the public waters." The State then argues that even the most rudimentary public facilities, i.e., litter barrels, picnic tables, and outhouses, cannot be placed on land that is periodically submerged. Thus sandbars do not provide a reasonable alternative to a public site easement.

In conclusion the State points out that the portion of the Yukon River within the Dineega Corporation's conveyance represents a 2-day boat trip for travelers starting at the conveyance boundary and traveling downstream in a nonmotorized craft, and that not all travelers will start a day's travel at the boundary. The State recognizes the problems with the site easements previously considered for this area and suggests two alternate locations which would minimize potential conflicts with Native culture and life styles.

BLM argues that there is a rational basis shown in the record for its decision and that it did make a reasonable effort to locate a site on public land. BLM notes that the proposed easements were published for comment (see Notice of Proposed Easement Recommendations for the Village of Ruby, Nov. 4, 1977); and that public, state, local, and village comments were obtained and analyzed as a routine part of circulating the draft State Director's easement memorandum, by conducting a meeting with the village and in regular contacts with the State (see Draft State Director's Easement Memorandum, Village Meeting Report, BLM Answer, Exh. 3; Final State Director's Memorandum, BLM Answer Exh. 2; Letter of Aug. 17, 1982, from Assistant to the BLM State Director for Conveyance Management to the President, Dineega Corporation, BLM Answer, Exh. 4; Letter of Aug. 27, 1982, from Land Management Officer, Alaska Department of Natural Resources, to Assistant to the BLM State Director for Conveyance Management; BLM Letter of Sept. 15, 1982, to State Department of Natural Resources, BLM Answer, Exh. 1; and miscellaneous file confirmations of telephone/personal contacts). BLM urges that through

the easement identification process and especially from the public meeting held in Ruby, BLM learned that the customary pattern of travel was a stopover in Ruby, on sandbars or on adjacent public lands (BLM Answer Exhs. 2 and 3). BLM admits that no assurance was obtained from Ruby officials as to the use of the municipal reserves but notes that local residents stated that travelers customarily stop at Ruby where there are commercial facilities and the municipal reserves. BLM also reports that knowledgeable residents reported that river travel through the conveyance area is rapid since the river flows at a rate of 3.5 mph. BLM contends that the foregoing represents a reasonable effort and establishes that there are reasonable alternatives on public lands which prevent the designation of easements on Dineega Corporation land.

Finally, BLM contends that its decision was correct, that the record supports it, that the State has not met its burden of proof and that, unless the Board can confirm the decision, a hearing is necessary to decide factual questions.

Dineega Corporation and Doyon Corporation did not file answers in this appeal.

[2] Departmental regulations governing the reservation of public easements specify that the primary standard for determining which public easements are reasonably necessary for access shall be present existing use. 43 CFR 2650.4-7(a)(3). The Board has held that present existing use is most reasonably interpreted to mean that public easements substantially conform to existing uses and that the evidence of such use be recent. Northway Natives, Inc., 69 IBLA 219, 234, 89 I.D. 642, 649 (1982) (overruled in part, on other grounds, in United States v. Fish & Wildlife Service, 72 IBLA 218 (1983). In the case of transportation easements, however, there are additional regulatory standards to be applied. With regard to site easements, 43 CFR 2650.4-7(b)(3) states in relevant part:

> Site easements which are related to transportation may be reserved for aircraft landing or vehicle parking (e.g., aircraft, boats, ATV's cars, trucks), temporary camping, loading or unloading at a trail head, along an access route or waterway, or within a reasonable distance of a transportation route or waterway where there is a demonstrated need to provide for transportation to publicly owned lands or major waterways. Temporary camping, loading, or unloading shall be limited to 24 hours. Site easements shall not be reserved for recreational use such as fishing, unlimited camping, or other purposes not associated with use of the public easement for transportation. Site easements shall not be reserved for future logging or similar operations (e.g., log dumps, campsites, storage or staging areas). Before site easements are reserved on transportation routes or on major waterways, a reasonable effort shall be made to locate parking, camping, beaching or aircraft landing sites on publicly owned lands; particularly, publicly owned lands in or around communities, or bordering the waterways. If a site easement is to be reserved, it shall:

(i) Be subject to the provisions of paragraphs (b)(1)(ii), (iii), (vi), (xii), (xiii), and (xiv) of this section. 6/

(ii) Be no larger than one acre in size and located on existing sites unless a variance is in either instance, otherwise justified.

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(iv) Be reserved only at periodic points on major waterways. Uses shall be limited to those activities which are related to travel on the waterway or to travel between the waterway and publicly owned lands. Also, periodic site easements shall be those necessary to allow a reasonable pattern of travel on the waterway.

The BLM easement decision for the Dineega Corporation is explained in a memorandum dated September 8, 1982. See Memorandum from Assistant to the State Director for Conveyance Management to Chief, Division of ANCSA and State Conveyances, BLM Answer, Exh. 2. The memorandum identified two site easements along the Yukon River not recommended for designation. EIN 18 C5 would have been a 1-acre easement upland of the ordinary high water mark in sec. 33, T. 8 S., R. 16 E., Kateel River meridian, on the right bank of the river. The memorandum states that reservation of this easement is not necessary as a trailhead because the corresponding trail easement is being deleted nor to allow for a reasonable pattern of travel because sandbars, islands, and Ruby's municipal reserves can be used by river travelers for stopping places. EIN 20 C5 would have been a 1-acre easement upland of the high water mark in sec. 11, T. 8 S., R. 17 3, Kateel River meridian, on the right bank of the river. It was not recommended for similar reasons.

In November 1977, BLM had distributed a notice of proposed easements to the Joint Federal State Land Use Planning Commission, Dineega Corporation,

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6/ The identified regulations state:

"(ii) Within the standard of reasonable necessity, be limited in number and not duplicative of one another (nonduplication does not preclude separate easements for winter and summer trails, if otherwise justified); "(iii) Be subject only to specific uses and sizes which shall be placed in the appropriate interim conveyance and patent documents;

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"(vi) Be reserved in topographically suitable locations whenever the location is not otherwise determined by an existing route of travel or when there is no existing site;

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"(xii) Not be reserved simply to reflect patterns of Native use on Native lands;

"(xiii) Not be reserved for the purpose of protecting Native stockholders from their respective corporations;

"(xiv) Not be reserved on the basis of subsistence use of the lands of one village by residents of another village."

Doyon Corporation, various offices of the State of Alaska, as well as numerous other parties. In this document the two easements had been recommended for designation. The purpose of EIN 18 C5 was then described as: "At the head of trail EIN 15, the site is for camping, staging, and vehicle use. The site is necessary to facilitate the public use of public waters and access to public lands. This is a staging area for moving equipment from the Yukon River to public lands." Similarly, the purpose of EIN 20 C5 was described as: "At the head of trail EIN 19, the site is for camping, staging, and vehicle use. The site is necessary to facilitate the public use of public waters and access to public lands." The draft of the September 8, 1982, easement memorandum containing similar descriptions to support the easements' recommendation was distributed for comment in April 1982 and BLM held a village meeting in Ruby with Dineega Corporation on June 11, 1982, on the Corporation's conveyance. The June 28, 1982, report on the meeting discussed the two easements as follows:

> (EIN 18 C5) The corporation opposes this site easement. It is not needed as a trailhead for trail EIN 11a C5, L, which is proposed for deletion in its present form. Site EIN 18 C5 is located near a Native allotment and impacts Native lifestyle. The site is not needed as a periodic site to facilitate Yukon River travel because river travelers stop at Ruby, where a commercial facility (Ruby Roadhouse) is available; sandbars and islands are also available for use by river travelers. Additionally, river travel through the conveyance area is rapid, due to the 3.5 m.p.h. current. Note: Ruby is a surveyed townsite with municipal reserves available for public use.

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> (EIN 20 C5) The corporation opposes this site easement because trail EIN 19 C5 is opposed: a trailhead is not necessary if trail EIN 19 C5 is deleted. The village of Ruby, as well as islands and sandbars, can be used for facilitating Yukon River travel; therefore, a periodic site is not needed. River travel through the conveyance area is rapid, due to the 3.5 m.p.h. current. Note: Ruby is a surveyed townsite with municipal reserves available for public use.

By letter dated August 17, 1982, BLM notified Dineega Corporation of its decisions regarding navigability, major waterways, and easements, including the deletion of proposed easements EIN 18 C5 and EIN 20 C5. A copy of this letter was also sent to the State which responded by letter dated August 27, 1982, with objections to the easement deletions similar to those raised on appeal. BLM then issued its final easement decision.

As pointed out by BLM, a party appealing a BLM easement determination has the burden of proving that the determination is erroneous. An easement decision will ordinarily be affirmed where it is supported by a rational basis; such decision will be reversed when it lacks a rational basis and is unsupported by the record. Goldbelt, Inc., 74 IBLA 308 (1983); United States

Fish & Wildlife Service, 72 IBLA 218 (1983). The record reflects that the primary purpose for EIN 18 C5 and EIN 20 C5 initially was the need for trailhead sites to correspond to two trail easements. To the extent that the site easements were deleted because the trail easements were deleted and, as to EIN 18 C5, because of the potential impact on a Native allotment, BLM's decision clearly has a rational basis.

As to the question which most concerns the State, that is, the need for site easements generally along this section of the Yukon River, we would conclude that BLM's decision not to reserve site easements is supported by the record but for one major concern. BLM found that Ruby is the common stopping point for river travelers and that river travel is fairly rapid through this area. The distance between the conveyance boundaries and Ruby is not so great that travelers could not plan their trips to accommodate a stop in Ruby. Sandbars, although they do not in any sense represent a permanent stopping place, do represent additional points along the river where short stops could be made to facilitate a day's travel. We agree with the State, however, that islands could not be used for stopovers. The State has not demonstrated that the pattern of travel is other than what BLM has found, and, therefore, has not met its burden of showing that BLM's decision is altogether erroneous.

However, the foregoing rests entirely on the assumption that Ruby is an available stopping place and that the Ruby municipal reserves may be used for those purposes for which a site easement would otherwise be designated. BLM states that Ruby is a surveyed townsite with municipal reserves available for public use. There is no information in the record as to the purposes for which the municipal reserves were reserved 7/ or the uses to which they are now put. BLM admits that it did not receive any assurances from local officials that the reserves could be used for activities related to travel. The regulations focus on the availability of publicly owned land, without apparent regard for the availability of commercial facilities. Absent a confirmed publicly owned stopping place in Ruby, we believe that the lack of site easements along this portion of the Yukon River would be a hindrance to reasonable travel. Therefore, the BLM decision must be set aside for the record to be supplemented concerning BLM's conclusion. BLM should examine such questions as: Where the reserves are, what the purposes are for which the lands were reserved, what limitations there may be on use of the reserves, what they are used for now, what their size and accessibility are, and whether they will be available for the uses at issue here in the future. In absence of support confirming that the municipal reserves may be used for the same purposes as site easements, BLM is directed to designate alternative site easements.

7/ There is no information in the file as to whether Ruby was established as a native or non-Native townsite. We note that the regulations governing non-Native townsites state in part:

"After the public sale and upon proof of the incorporation of the town, all lots then remaining unsold will be deeded to the municipality, and all municipal public reserves will, by a separate deed, be conveyed to the municipality in trust for the public purposes for which they were reserved." 43 CFR 2565.7 (1982) (emphasis added).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is set aside and remanded.

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge